

DIVISION IV

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
KAREN R. BAKER, Judge

CA05-01411

JUNE 21, 2006

ITT AUTOMOTIVE and PACIFIC
EMPLOYERS INSURANCE CO.

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[E405485]

APPELLANTS

v.

RANDAL HENDRIX

AFFIRMED

APPELLEE

Appellants ITT Automotive and Pacific Employers Insurance Company challenge the decision of the Workers' Compensation Commission that held that the March 7, 2003 opinion and order of the Administrative Law Judge (ALJ) served as res judicata entitling appellee Randal Hendrix to the additional medical benefits he sought for treatment protocol devised for Mr. Hendrix at the International Pain Center (IPC) in Lubbock, Texas, on June 13, 2002. This treatment protocol involved spinal cord stimulation. We find no error and affirm.

The facts of this case begin in 1993 and involve an injury sustained by Mr. Hendrix in the course and scope of employment. The parties stipulated that on October 27, 1993, Mr. Hendrix suffered compensable bilateral carpal tunnel syndrome. Over the next several years, Mr. Hendrix underwent numerous surgeries. He tried various treatment plans and took several medications. Since the time of the injury, the parties have been before administrative law judges and the Full Arkansas Workers' Compensation Commission more than once.

The previous decision critical to this appeal was rendered on March 7, 2003, by ALJ Michael White. In that opinion, the ALJ held that treatment obtained by Mr. Hendrix at the IPC in Lubbock, Texas, prior to the hearing was reasonably necessary. Appellants contend that the opinion specifically held that the future treatment of a peripheral nerve stimulator was reasonably necessary;

however, they assert that no other future treatments were approved. Following ALJ White's March 2003 opinion, Mr. Hendrix received several treatments at the IPC, including the peripheral nerve stimulator. Appellants declined to pay for treatments other than the peripheral nerve stimulator. This denial led to another hearing with order entered on February 18, 2005 at which ALJ Mark Churchwell ruled that the March 7, 2003 opinion entered by ALJ White governed the issues at hand. ALJ Churchwell held that the opinion had a res judicata effect, preventing appellants from litigating the necessity of the treatments received at IPC. In addition, ALJ Churchwell assessed a penalty pursuant to Arkansas Code Annotated section 11-9-802 against appellants, finding that they had willfully and intentionally refused to pay for the treatments at issue, based upon both treatment and travel expenses. On appeal on August 31, 2005, the Commission affirmed ALJ Churchwell's order except for the penalty on travel expenses.

Appellants argue that the benefits Mr. Hendrix sought did not fall within the March 2003 opinion. They argue that the Commission erred because the protocol devised for Mr. Hendrix on June 13, 2002, was never mentioned in the March opinion. They also argue that the compensability of the protocol was not listed as an issue at the hearing. Accordingly, they assert that the requirements for collateral estoppel are not met.

The Commission found that res judicata applied relying in part on two key aspects of the evidence. First, in a letter dated May 17, 2002, and relied upon by ALJ White, Dr. Hart explained his rationale for referring Mr. Hendrix to the care of Dr. Racz in Lubbock, Texas. This rationale included the fact that Dr. Racz was the leading expert on not only spinal cord stimulation, but also peripheral nerve stimulation. Dr. Hart explained that the technology for spinal cord stimulation was unavailable in the State of Arkansas, and that he was unaware of any physician in Arkansas who was doing peripheral nerve stimulation. Second, the treatment protocol developed for Mr. Hendrix on June 13, 2002, by Dr. Leland Lou, an attending physician in Dr. Racz's group in Lubbock, Texas, discussed the protocol for stimulator placement. The 2002 order recognized the peripheral nerve stimulator implant recommended by Dr. Racz and the IPC as reasonably necessary and that Mr.

Hendrix had proven entitlement to the treatment. ALJ White also had before him the June 13, 2002 treatment protocol developed for Mr. Hendrix by Dr. Leland Lou, an attending physician in Dr. Racz's group at the Texas Tech Pain Institute in Lubbock, Texas. That protocol for stimulator placement proposal included the following:

PLAN: This plan was discussed with the patient with verbal understanding.

1. We will schedule a right stellate ganglion block with local anesthetic and steroid, and proceed to RFTC of the right stellate ganglion if successful.
2. In the future, we will consider a left stellate ganglion block and proceed to RFTC of the left stellate ganglion if successful.
3. We will follow with bilateral thoracic sympathetic blockade and proceed to RFTC if successful.
4. We will attempt to schedule a single versus dual dorsal column stimulator trial in an effort to reduce central pain in both upper extremities.
5. We will consider in the future the possibility of right medial nerve peripheral nerve stimulator.
6. We would suggest a possible Zonegran trial to Dr. Hart in Arkansas but will allow him to make this medication management decision. Because of the patient's Workmans Compensation status we will aggressively attempt to have these procedures scheduled and approved and do them as quickly as possible because the patient is from out of town. The patient has offered to cover some of these procedures out of their pocket, and we hope this will not be necessary.
7. The attending physician was present and involved in the entire care, planning, and treatment of this patient today.

As the Commission explained in its opinion, Mr. Hendrix began treating with Dr. Lou and Dr. Martucci, pursuant to Dr. Hart's referral, in June 2002. Dr. Lou and Dr. Martucci planned a course of treatment for Mr. Hendrix which included bilateral stellate ganglion blocks, a sympathetic blockade, a dorsal column stimulator, a possible peripheral nerve stimulator, and continued medication management.

In July 2002, Dr. Hart explicitly recommended a referral to Dr. Racz at the IPC. On March 7, 2003, ALJ White found that treatment provided by Dr. Racz was reasonably necessary for treatment of the compensable injury. The ALJ ordered and directed appellants to pay benefits in

accordance with the ALJ's finding of fact. There was no appeal of the ALJ's opinion.

The Commission also found that a preponderance of the evidence showed that treatment provided by Dr. Racz following the March 7, 2003 order included bilateral ganglion blocks and consideration of a dorsal column stimulator. The Commission noted that Dr. Racz's treatment plan appeared to be essentially the same as the "treatment protocol" outlined by Dr. Lou and Dr. Martucci on June 13, 2002.

Appellants assert that "[i]n sum, in the June 13, 2002 protocol, one right-sided block was planned, and one left ganglion block and one bilateral thoracic sympathetic blockade was considered. However, Mr. Hendrix actually received two right-sided blocks, three right-sided lesionings, one thoracic blockade, and one left-sided ganglion block with lesioning." They argue that this treatment was not the treatment planned and considered in Dr. Lou's June 13, 2002 report.

Appellants do not discuss the significance of the treatment protocol's reference to RFTC.

Those initials stand for Radiofrequency Thermocoagulation.¹ A review of the documentation supports the Commission's conclusion that the procedures followed were contemplated, leading to and including the lesionings.

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Beliew v. Stuttgart Rice Mill*, 64 Ark. App. 334, 987 S.W.2d 281 (1998); *Perry v. Leisure Lodges*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of *res judicata* is applicable to decisions of the Commission. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996); *Tuberville v. International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986). The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993); *Pine Bluff Warehouse v. Berry*, 51 Ark. App. 139, 912 S.W.2d 11 (1995). *See also Castleberry v. Elite Lamp Co.* 69 Ark. App. 359, 13 S.W.3d 211 (2000).

This is not a case where the Commission's application of the doctrine was misplaced because the appellant's position was that his condition had *changed* since the last opinion. *See O'Hara v. J. Christy Constr. Co.*, ---Ark. App. ----, --- S.W.3d ---- (Feb. 8, 2006); *Cariker v. Ozark Opportunities*, 65 Ark. App. 60, 987 S.W.2d 736 (1999).

In this case, appellants argue that the order was subject to interpretation and that the protocol was not specifically ordered. Base upon the evidence, substantial evidence supports the Commission's decision that the protocol was considered and authorized. Accordingly, we affirm.

Affirmed.

¹Fluoroscopically guided radiofrequency thermocoagulation is used for facet joint denervation for fact joint disease and pain. Radiofrequency lesioning is performed only after pain relief is obtained after a diagnostic block. This procedure is performed if prolonged relief is not obtained with these blocks; however, it will not provide a permanent cure as the nerve fiber will regenerate usually within twelve months. The time of relief has a wide variance and may have to be repeated in order to provide optimal relief of pain complaints.

VAUGHT and CRABTREE, JJ., agree.
